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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-558

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

v

ROMES MCMILLER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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PEOPLE OF THE STATE OF MICHIGAN,
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v
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PETITION FOR WRIT OF CERTIORARI

The People of the State of Michigan Petitioner, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above-entitled cause on June 18, 1973, rehearing denied July 26, 1973.

CITATION OF OPINIONS BELOW

The original Opinion of the Michigan Supreme Court dated June 18, 1973 is reported at 208 NW 2d 451 and attached hereto as Appendix A. The Opinion of the Michigan Court of Appeals affirming the judgment of the trial court is reported at 195 NW 2d 801 and attached hereto as Appendix B. The Opinion of the Michigan Court of Appeals vacating the plea originally accepted by the trial court is reported at 174 NW 2d 24 and attached hereto as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on June 18, 1973 and a timely application for rehearing was denied by an order dated July 26, 1973.

Jurisdiction is invoked under United States Supreme Court Rule 19, 28 USCA.

QUESTIONS PRESENTED FOR REVIEW

1. Does the trial of Defendant on the original charge after his bargained plea to a lesser offense was set aside on appeal constitute double jeopardy in violation of the Fifth Amendment?

2. Can the Michigan Supreme Court avoid the jurisdiction of the United States Supreme Court by couching its decision in terms of policy, thereby contradicting Michigan's Constitution of 1963 and its own previous decisions?

3. Can the Michigan Supreme Court violate the rights of the People of the State of Michigan, individually and as a class, by failing to recognize an applicable State statute in reaching its decision?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

AMENDMENT XIV Sec 1 . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On the morning of November 5, 1968 in the City of Jackson, Romes McMiller shot John Junior Watson in the head. Watson died later that morning at the University Hospital in Ann Arbor.

On the evening of November 6, 1968, McMiller was arrested on an open charge of murder.

On November 19, 1968, McMiller was arraigned in the Jackson County Circuit Court on an open charge of murder.

On January 13, 1969, McMiller offered a plea of guilty to the included offense of manslaughter which was accepted by the Court. On January 28, 1969, McMiller was sentenced to 10 to 15 years in prison.

McMiller subsequently appealed the conviction on the grounds that insufficient facts were elicited during the offer to support the plea. The Court of Appeals agreed, vacated the plea and remanded for trial. *People* v *McMiller*, 174 NW 2d 24 (1969).

On February 9, 1970, McMiller's trial began and on February 19, 1970, the jury found him guilty of murder of the second degree. On February 27, 1970, McMiller was sentenced to 15 to 20 years in prison.

McMiller appealed again, claiming that he was subjected to double jeopardy contrary to his rights under the federal constitution when he was tried for murder after his plea to manslaughter was vacated. The Michigan Court of Appeals affirmed his conviction. *People* v *McMiller*, 195 NW 2d 801 (1972).

Leave to appeal to the Michigan Supreme Court was sought by the defendant and granted on April 11, 1972.

The brief for McMiller argued that the trial for murder was proscribed by the double jeopardy clause of the Fifth Amendment and the due process clause of the Fourteenth Amendment, citing *Mullreed* v *Kropp*, 425 F 2d 1095 (6th Cir, 1970), *Rivers* v *Lucas*, 477 F 2d 199 (6th Cir, 1973), and *People* v *Payne*, 386 Mich 84 (1971), reversed *Michigan* v *Payne*, ... US ....., 36 L ed 2d 736, 93 S Ct 1966 (1973).

On June 18, 1973, the Michigan Supreme Court reversed the 2d degree murder conviction, deciding that although the basis for the *Mullreed* and *Rivers* decisions incorrectly stated the law, the result was good and for "policy" reasons would be the law in Michigan. A conviction for manslaughter was entered and the case was remanded for resentencing. *People* v *McMiller*, 208 NW 2d 451 (1973).

A timely application for rehearing was filed pointing out that neither side had been aware that any policy was under consideration and had merely briefed the constitutional questions. The rehearing was denied on July 26, 1973.

REASONS FOR GRANTING THE WRIT

The necessity of plea-bargaining has been recognized by appellate courts across the land. Since all bargains are not kept and all pleas are not perfect, the vacation of pleas is sometimes a necessary part of an appellate court's task. At that point, the question is raised: Upon what charge does the defendant stand trial? Is he tried on original count or counts or must the trial be confined to the lesser offense to which he pled?

Despite clear statements by all members of this Court in *Santobello* v *New York*, 404 US 257, 30 L ed 2d 427, 92 S Ct 495 (1971) that vacation of a bargained plea requires the defendant to face the original charge or charges, the Michigan Supreme Court has concluded that "for policy reasons", this practice should not be followed in Michigan. Four of the seven members of the Court said that although they have recently promulgated a very detailed plea procedure, effective June 1, 1973, and warned that failing to follow the requirements to the letter is reversible error, further incentive is needed. In order to encourage the prosecuting attorney to help the trial court to follow the requirements, the Court will prohibit trial on charges higher than the one to which the defendant pled if the plea is reversed, and this new "policy" is to be applied retroactively to the Defendant's conviction.

In support of this policy, the Court cited the doctrine of *autrefois acquit*. Historically, this phrase described the defense raised by a defendant claiming that he was being placed in jeopardy twice — the very same doctrine which the Court claimed was not applicable.

The Court's decision threatens the practical ability of the prosecuting attorney to participate in plea bargaining and must be corrected at once. This is particularly true in Michigan where our Supreme Court has demonstrated a marked tendency to proclaim new rules governing the taking of pleas and then applying them retroactively to overturn numerous pleas accepted before the promulgation of the new guidelines. *People* v *Butler*, 195 NW 2d 268 (1972); *People* v *Jaworski*, 194 NW 2d 868 (1972). Pre-*Jaworski* pleas are still being reversed pursuant to the *Jaworski* decision and Michigan attorneys are still wondering what their Court is going to require next.

No other state has come to the conclusion described above. Only the Sixth Circuit Court of Appeals has reached a similar conclusion although the Michigan Supreme Court, in the instant case, condemned the reasoning behind the Court of Appeals' decisions.

The Court must correct the errors of these decisions and definitively state the inapplicability of the double jeopardy concept to trials after plea vacations or reversals.

The Court should issue the Writ for five reasons, considered separately below.

1.

The trial and conviction of Defendant for murder after his manslaughter plea was vacated on appeal did not constitute double jeopardy.

This Court has clearly stated in several cases that a defendant cannot be retried on the original charge because of the double jeopardy prohibition only if the trier of fact was given a full opportunity to return a verdict on that charge and instead reached a verdict on the lesser charge. *Price* v *Georgia*, 398 US 323, 26 L ed 2d 300,

90 S Ct 1757 (1970); *Green* v *United States*, 355 US 184, 2 L ed 2d 199, 78 S Ct 221 (1957); *United States* v *Ball*, 163 US 662, 41 L ed 300, 16 S Ct 1192 (1896).

The plea situation is not such a case. When Defendant offered his plea to manslaughter, the trial court could not have found him guilty of murder. The only choice was whether to accept or reject the offered plea to manslaughter. If the plea had been rejected, Defendant would have been tried for murder. If the plea had been accepted and later withdrawn, Defendant would have been tried for murder. If the plea to manslaughter is vacated on appeal for being insufficient, Defendant should be tried for murder. Jeopardy has not attached.

The Michigan Supreme Court agreed with the above reasoning. In its opinion, the Court said:

> "*McMiller* was never in peril of being convicted and punished for murder. He has not 'run the gauntlet' on that charge. Unlike a jury trial, a choice was not offered to the independent fact finder to find him guilty of murder, first or second, or manslaughter. It is this 'choice' of the fact finder that provides the basis for the implication of acquittal. It is the exposure to it that puts one in 'jeopardy'."

The Court then went on to ignore this reasoning and decide "for policy reasons" to prohibit trial on the original charge.

2.

Conflict exists among the federal circuits and now among the states as to whether a defendant may be tried on the original charge if his plea to a lesser offense is set aside on appeal.

The 2d, 3d, 9th and 10th Circuits have held in varying fact situations that prosecution of a defendant on all the original charges if a bargained plea is overturned is proper and does not constitute double jeopardy. *United States*

ex rel Williams v *McMann*, 436 F 2d 103 (2d Cir, 1970) cert denied, 402 US 914 (1971); *United States ex rel Culbreath* v *Rundle*, 466 F 2d 730 (3d Cir, 1972); *Schoultz* v *Hocher*, 469 F 2d 681 (9th Cir, 1972); *Ward* v *Page*, 424 F 2d 491 (10th Cir, 1970) cert denied, 400 US 917 (1970).

The 6th Circuit has twice held that trial on the original charge after a plea to a lesser offense is overturned on appeal is double jeopardy. *Mullreed* v *Kropp*, 425 F 2d 1095 (6th Cir, 1970), *Rivers* v *Lucas*, 477 F 2d 199 (6th Cir, 1973). *Mullreed* died before this Court had an opportunity to review that decision and review of the *Rivers'* decision is currently being sought.

Michigan is the only state which prohibits a defendant's re-trial on the original charge if his plea to a lesser offense is overturned on appeal. If the instant decision is allowed to stand, federal rights under the Fifth and Fourteenth will be improperly and unequally applied in Michigan as compared to all the other states.

3.

The decision in this case deprived the People of the State of Michigan, individually and as a class, of the right to due process and equal protection.

In rendering its decision, the Michigan Supreme Court ignored the following section of Michigan statute:

> "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, *it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.*" (emphasis added) Michigan Statutes Annotated 28.1096, Michigan Compiled Laws Annotated 769.26.

No miscarriage of justice was found in the Court's opinion nor was this argued by Defendant on appeal. The entire appeal was based on the federal constitutional question of double jeopardy. Neither side had any inkling that a policy rationale was under consideration until the opinion was received. In the People's application for rehearing, the Court was directly confronted by the statute requiring a finding of miscarriage of justice and the lack of notice. It again chose to ignore these legal requirements without acknowledging the statute's existence.

The citizens of this State have as much right as a criminal defendant to effectively enforced and fairly interpreted laws. *Reynolds* v *Sims*, 377 US 533, 12 L ed 2d 506, 84 S Ct 136 2 (1964); *Gomillion* v *Lightfoot*, 364 US 339, 5 L ed 2d 110, 81 S Ct 125 (1906); *Cooper* v *Aaron*, 358 US 1, 3 L ed 2d 5, 78 S Ct 1401 (1958); *Ex parte Virginia*, 100 US 339, 25 L ed 676 (1880). By ignoring this section of statute, the Court denied the People their rights to due process and equal protection of the laws. *NAACP* v *Button*, 371 US 415, 9 L ed 2d 405, 83 S Ct 328 (1963); *Louisiana ex rel Gremillion* v *NAACP*, 366 US 293, 6 L ed 2d 301, 81 S Ct 1333 (1961); *NAACP* v *Alabama*, 357 US 449, 2 L ed 2d 1488, 78 S Ct 1163 (1958).

If the Michigan Supreme Court had failed to apply the applicable state statute in order to rule against a defendant, this Court should and would not hesitate to grant relief. This Court should do no less for the other party in the action, the People of the State of Michigan.

4.

If the decision of the Michigan Supreme Court is correct, the requirement of this Court in *Santobello* v *New York*, 404 US 257, 30 L ed 2d 427, 92 S Ct 495 (1971), that defendant be tried on the original charges was a miscarriage of justice.

If the Michigan Supreme Court had applied the above quoted section of Michigan statute (MSA 28.1096) and found that retrial on the original charge did constitute a

miscarriage of justice, it would have in effect declared that this Court committed a miscarriage of justice in rendering the *Santobello* decision. Thus, the Michigan Court may have attempted to avoid an obvious dilemma by ignoring it. In *Santobello,* this Court remanded with instruction that either defendant be sentenced according to the plea bargain by another judge or that defendant's plea be vacated and all original charges reinstated. A minority of the Court indicated that resentencing was not a proper remedy but agreed that the case should be remanded for trial on the original charges.

In fact, there was no miscarriage of justice perpetrated by the *Santobello* decision and neither was there a miscarriage of justice in the trial and conviction of Defendant for murder after his manslaughter plea was vacated. The Michigan Court knowingly decided a federal Constitutional question incorrectly and attempted to avoid the review of this Court by couching their decision in "policy" terms — a newly discovered, retroactive policy. When confronted with the above quoted Michigan statute (MSA 28.1096) in the People's application for rehearing, the Michigan Court refused to consider it because they knew that if the decision in *Santobello* is not a miscarriage of justice, their decision clearly violated the Michigan Statute.

5.

The Michigan Supreme Court deliberately attempted to avoid the jurisdiction of this Court by wording its decision in terms of policy instead of double jeopardy.

The questions presented to the Michigan Supreme Court by both sides in briefs and oral arguments centered on whether Defendant's trial murder violated the double jeopardy and due process protections of the federal constitution. The Court declined to reach those questions in its opinion.

The Court commented on the decisions in *Mullreed, supra,* and *Rivers, supra,* agreeing with the results but not the bases for these decisions. There is no constitu-

tional, statutory or case precedent basis for its opinion.

The conduct of a prosecution on behalf of the People is an executive act. *People* v *Dickerson,* 129 NW 199 (1910). In the past, the Michigan Supreme Court has held that the prosecuting attorney is the chief law enforcement officer of the county and has the right to exercise broad discretion in determining what charges shall be pursued. *People* v *Lombardo,* 3 NW 2d 839 (1942); *People* v *Mire,* 138 NW 1066 (1912).

The Michigan Supreme Court has ignored Article 3, Section 2 of Michigan Constitution of 1963 which reads:

> "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

Although the Court has the power to interfere with the discretion of the prosecuting attorney only when a constitutional or statutory right is involved, it has done so here under the claim of policy. The Court has no power or authority to make such a "policy" decision.

Recently the Michigan Supreme Court has stated that for the judiciary to claim power to control the institution and conduct of prosecutions would be an intrusion on the power of the executive branch and violative of the constitutional separation of powers. *People ex rel Leonard* v *Papp,* 194 NW 2d 693 (1972).

More recently in *People* v *Curtis,* 209 NW 2d 243 (1973), the Michigan Supreme Court said at 249:

> "The Circuit Court judge may not substitute his opinion for that of the prosecuting attorney . . .
>
> . . . ' "Acting as prosecutor, judge and jury" is a common description of an unlawful operation. However innocently and mistakenly, this is what happened in this case. The trial judge assumed the right over the objection of the prosecutor to determine under which of two applicable statutes a prosecution will be instituted. As already indicated *such determination is an executive function* and a part of the

> **duties of the prosecutor.' Such rationale is equally applicable to the situation where a judge demands that the prosecutor proceed on a higher charge as it is when he decides which of 2 charges the case will be proceeded upon. The effect upon the defendant and the prosecutor is the same."**

If the judiciary cannot tell the prosecuting attorney which of two charges on which to proceed or to proceed on a higher offense than the one charged, the judiciary clearly should not, absent constitutional or statutory reasons, tell the prosecuting attorney to proceed on a lesser offense.

As a rationale for its "policy" decision, the Michigan Supreme Court expressed the fear that to allow trial on the original charge upon vacation of a plea on appeal would discourage the exercise of the right to appeal. Their promotion and encouragement of the appeal of bargained guilty pleas has clogged the appellate courts of this State and made the Michigan appellate process one of the slowest and most ponderous in the United States.

The experience of the Jackson County Prosecutors Office and of the Courts around this State contradicts this fear. Our appeal files and those of other counties show that defendants in Michigan appeal their convictions, whether by plea or trial, if they are sentenced to prison. Defendants who receive a fine and/or probation as a rule do not exercise their right to appeal. Defendants sentenced to prison as a rule do exercise their right to appeal. This may be partly because they have been sent to prison and are there encouraged by other inmates if not by the appellate courts themselves, to appeal and partly because it costs them nothing financially to appeal.

In Michigan, sentencing is discretionary with the trial court within the statutory maximum and more recently, within the dictates of *People* v *Tanner,* 199 NW 2d 202 (1972). Plea bargaining therefore revolves around pleading to a lesser offense in order to reduce a defendant's maximum exposure to prison. The prosecuting attorney is often motivated to participate in plea bargaining because he knows the minimum sentence will be the same, whatever the conviction. Defendants are also aware of

this sentencing pattern and thus the Michigan Supreme Court's basis for its decision is groundless.

This Court has continually held that it will not allow a state court to deny or misapply a substantial federal right by appearing to decide the case on another state ground. *Barr* v *Columbia,* 378 US 146, 12 L ed 2d 766, 84 S Ct 1734 (1964); *Wright* v *Georgia,* 373 US 284, 10 L ed 2d 349, 83 S Ct 1240 (1963); *Staub* v *Baxley,* 355 US 313, 2 L ed 2d 302, 78 S Ct 277 (1958); *Ward* v *Love County,* 253 US 17, 64 L ed 751, 40 S Ct 419 (1920).

By refusing to determine the constitutional issues presented and ignoring the Michigan Constitution, the pertinent state statute and its previous relevant decisions, the Michigan Supreme Court clearly demonstrated its intent to avoid federal jurisdiction.

CONCLUSION AND RELIEF REQUESTED

For these five reasons and others which the record, briefs and argument may disclose, the decision of this Honorable Court should be to grant the Petition of the People of the State of Michigan and to issue a Writ of Certiorari to the Michigan Supreme Court and to review and reverse the decision of that court.

Respectfully submitted,

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APPENDIX A — OPINION OF THE MICHIGAN SUPREME COURT
(Filed June 18, 1973)

8 *January* 1973

BEFORE THE ENTIRE BENCH

T. G. KAVANAGH, J.

We granted leave in this case and the case of *People* v *Wolff* to consider the implications of the setting aside of a plea of guilty to a lesser offense and putting the defendant on trial for a higher offense.

The facts are not complicated.

On November 14, 1968, defendant was charged with the murder of John "Junior" Watson. On January 13, 1969, defendant pled guilty to the lesser offense of manslaughter. He was sentenced to serve a term of 10-15 years in prison on January 28, 1969.

Defendant appealed his conviction, and the court of appeals reversed.[1] Thereupon, defendant was charged, tried, and convicted of murder. On February 27, 1970, defendant was sentenced to 15-20 years in prison. The court of appeals affirmed,[2] basing its decision on that court's holding in *People* v *Harper,* 32 Mich App 73 (1971) and quoting from one of the opinions in that case which it mistakenly characterized as the majority opinion.

That opinion was contrary to and critical of the holding in *Mullreed* v *Kroff,* 425 F2d 1095 (CA6 1970).

The court of appeals' reliance on *Harper* as authority appears questionable in light of our grant of leave in that case, although the appeal to our court was later dismissed on stipulation of the parties.

On April 24, 1973 in *Rivers* v *Lucas,* F2d ..... (CA6, 1973) the United States Court of Appeals for the Sixth

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[1] 20 Mich App 309 (1969)

[2] 38 Mich App 99 (1972)

Circuit reiterated its holding in *Mullreed, supra.* The Court said at p .....:

> "We affirm that there is implicit in a court's acceptance of a plea to an included lesser offense a determination that the right to prosecute the defendant on the more serious offense with which he is charged has been relinquished. The effect of the entire transaction, for double jeopardy purposes, is the equivalent of a jury's refusal to convict on the more serious charge. Only if this is true may a defendant seek review of his conviction without being faced with the 'incredible dilemma' of choosing between a legal right of appeal and the possibility that success will revive the hazard of conviction of a charge which the prosecution has willingly abandoned in exchange for his plea. *Mullreed* v *Kropp, supra,* at 1102. The continuation principle of jeopardy makes it possible for appellee Rivers to be tried again for the same offense of which he was convicted by his guilty plea (manslaughter), but his successful appeal did not open the way for him to be once again subjected to the risk of prosecution for murder."

While we are in total agreement with the result reached in *Rivers* and *Mullreed,* we are in respectful disagreement with the stated reason therefor.

The doctrine of double jeopardy has proper application where the people attempt to re-try a defendant for the same offense.

The doctrine of implied acquittal by a jury's verdict convicting the defendant of a lesser included offense, in our view, is not properly applicable to a guilty plea conviction.

Green v *United States,* 355 US 184; 78 S Ct 221; 2 L ed 2d 199 (1957) explains the theory of "implied acquittal" on a jury's verdict. The Court said (p 190):

> "Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and

> the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder."

But we find those considerations absent in this case. *McMiller* was never in peril of being convicted and punished for murder. He has not "run the gantlet" on that charge.

Unlike a jury trial, a choice was not offered to the independent fact finder to find him guilty of murder, first or second, or manslaughter. It is this "choice" of the fact finder that provides the basis for the implication of acquittal. It is the exposure to it that puts one in "jeopardy".

A trial is an adversary procedure. Taking a plea of guilty is not an adversary procedure.

The result is the same — conviction, and so long as that conviction stands, the effect is identical. A conviction can be set aside only for an error in the procedure whereby it was effected. Logic would say that a defective procedure is a nullity, and hence would dictate that we start all over with a clean slate. But we do not do so in all cases.

As we have seen, for *policy reasons* we forbid adversary procedure to expose a person to conviction for a higher offense when the independent fact finder has chosen to find him guilty of a lesser offense. We express this policy in terms of "double jeopardy" although strictly speaking this is an extension of the doctrine of *autrefois acquit*.

Among the considerations in formulating a policy regarding prosecutions following the successful appeal of a plea-based conviction, there are two we find overriding which impel us to our decision:

Allowing trial on a higher charge following reversal of a plea-based conviction of a lesser offense would (1) discourage exercise of the defendant's right to appeal a conviction claimed to be based on an improperly accepted plea, and (2) tend to insulate from appellate scrutiny non-

compliance with the guilty plea procedure established by the statute and the court rule.

We, the bench and bar of Michigan, have invested untold hours of effort in an attempt to devise a rule for the taking of guilty pleas which will fairly and finally dispose of over 75% of our criminal cases. In the latest amendment to our court rule dealing with this subject[3] we have detailed certain steps necessary to the proper taking of a guilty plea and provided that failure to follow the rule will constitute reversible error. We intend thereby to assure the corollary that observance of the rule will result in unassailable conviction.

We recognize that a prosecutor's willingness to allow an accused person to plead to a lesser offense is generally predicated on the assumption that the accused will, upon acceptance of a plea of guilty, stand convicted and will be sentenced for the lesser offense. We also recognize that the rule we adopt means that a successful appeal from a plea-based conviction for a lesser offense defeats that legitimate expectation, deprives the prosecutor of leverage he otherwise would have in further plea bargaining upon re-prosecution, may well, therefore, burden the prosecutor with the need to prove his case at a trial and at the same time limits the people to a conviction less than the proofs may justify.

We balance these considerations against the danger that re-prosecuting on higher charges those who successfully appeal from plea-based convictions and imposition of sentence based on the higher charge, will cause convicted persons to forego legitimate appeals and thereby encourage a return to practices which the carefully worked out guilty-plea procedures are designed to obviate.

The prescribed procedure for taking a guilty plea can readily be observed. Compliance in every case with the prescribed procedure is, we are convinced, essential to the integrity of the plea-taking process. We are also convinced that a rule limiting re-prosecution to the lesser offense will tend to reduce the number of meritorious ap-

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[3] GCR 1963, 785.1 *et seq.*, eff 6/1/73

peals — a successful appeal from a guilty-plea-based conviction is likely to become a rarity. Thereby — because they are without merit — appeals from guilty pleas will properly be discouraged.

As between placing a premium on compliance with the prescribed guilty-plea procedure in the literally tens of thousands of cases a year where pleas are offered, accepted and sentences imposed, and limiting the scope of reprosecution in the relatively few — particularly if we adopt this rule — cases where appeals are likely to be successful, we are convinced that the administration of justice will be better served by the choice we have made.

By agreeing to a plea to a lesser offense the prosecutor thereby vouches that the ends of justice will be served by accepting a plea of guilty to that offense. We perceive, therefore even in the relatively few cases where defendants will succeed on appeal in setting aside a guilty-plea based conviction, no erosion of law enforcement in the rule we adopt.

A prosecutor can protect himself against being forced to try a defendant on a lesser offense by calling the attention of the judge, before he accepts a plea of guilty, to any failure to comply with the prescribed procedure for taking such a plea.

For these reasons we hold that upon the acceptance of a plea of guilty, as a matter of policy, the state may not thereafter charge a higher offense arising out of the same transaction.

If the prescribed guilty plea procedure is observed in taking the plea, the conviction will stand. If the procedure is not observed, the conviction will be set aside and the defendant ordered tried on the charge to which the plea was offered.

The jury in this case, having found the defendant guilty of murder, has necessarily found the elements establishing his guilty of the lesser offense of manslaughter.[4] For

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[4] *People* v *Morrin*, 31 Mich App 301 (1971); *Austin* v *United States*, 127 App DC 180; 382 F2d 129 (1967).

the reasons set forth herein, the conviction of murder is set aside, the judgment of conviction is amended to show that the defendant is convicted of manslaughter, and the cause is remanded for resentencing on the manslaughter conviction.

(s) Thomas Giles Kavanagh
(s) Thomas M. Kavanagh
(s) G. Mennen Williams
(s) John B. Swainson

BEFORE THE ENTIRE BENCH, except LEVIN, J.

BRENNAN, J.

Defendant was charged with murder. He pled guilty to the lesser and included offense of manslaughter on January 13, 1969, and was sentenced to a term of 10 to 15 years in prison.

Appeal was taken by the defendant from that guilty plea conviction. The People confessed error and the Court of Appeals reversed the conviction in *People* v *McMiller*, 20 Mich App 309 (1969).

Thereafter, the defendant was re-arraigned on the original information charging murder. A jury trial resulted in a conviction of second degree murder and defendant was sentenced on February 27, 1970, to a term of 15 to 20 years in prison.

Defendant appealed, claiming double jeopardy, and attacked the higher sentence, citing *North Carolina* v *Pearce*, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969).

The Court of Appeals affirmed, taking issue with *Mullreed* v *Kropp*, 425 F2d 1095 (CA 6, 1970), and holding the harsher sentence justified where the second conviction was for a more serious offense. 38 Mich App 99 (1972).

The Prosecuting Attorneys Association of Michigan has filed an Amicus Curiae Brief.

It is conceded that upon a trial for murder, conviction of manslaughter operates as an acquittal of the murder charge, *People* v *Knapp*, 26 Mich 112 (1872); *People* v *Comstock*, 55 Mich 405 (1884); *Green* v *United States*, 355

US 184; 78 S Ct 221; 2 L Ed 2d 199 (1957), and upon a new trial, the defendant cannot be convicted of the higher offense.

Green v *United States, supra,* gives two reasons for the rule. The first is based upon the theory of implied acquittal. The *Green* court said:

> "Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder." (p 190)

The second reason is founded in the court's concern for the chilling effect of attaching a forfeiture or disadvantage to the exercise of a constitutional right.

> "Reduced to plain terms, the Government contends that in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal. Or stated in the terms of this case, he must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment. As the Court of Appeals said in its first opinion in this case, a defendant faced with such a 'choice' takes a 'desperate chance' in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma. Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a

forfeiture in plain conflict with the constitutional bar against double jeopardy." (pp 193-194)

Neither of these reasons apply in the case at bar, where the former, vacated conviction is based upon the defendant's plea of guilty to a specific included offense.

At no time did this defendant, McMiller, "run the gantlet" on the charge of murder. At no time was any judge or jury "given the choice between finding him guilty of either first or second degree murder" or manslaughter. Because he pled guilty to manslaughter, this defendant was never in jeopardy, never in danger, never exposed, in the constitutional sense, to a conviction of murder.

A plea of guilty, unlike a verdict, does not operate as an implied acquittal of higher offenses. In the case of a verdict, it is the choice of the jury which gives rise to the implied acquittal. But a plea of guilty is made by the defendant himself. It cannot be said that he has impliedly acquitted himself of the higher charge by his plea to the lesser offense.

Similarly, the rationale of the chilling effect of retrial upon the higher offense is inapplicable in the case of an appeal from a guilty plea.

Unlike the jury-tried defendant, the plea-convicted defendant has not purchased his claim of double jeopardy at the price of anxiety. He has not waited, wondering, while a jury deliberated his fate.

Indeed, his only claim to a defense of double jeopardy stems from his own words of admission. The only "choice," or "desperate chance," or "incredible dilemma" he faces is the precise set of alternatives which confronted him before he entered his plea of guilty in the first place.

The jury-tried defendant should not be required to barter away his double jeopardy defense to the higher charge as the price of appealing the lesser conviction. He has earned that defense. It is his. To require its surrender, is to ask a price or forfeiture.

But the plea-convicted defendant has not earned his double jeopardy defense to the higher charge. He holds it only conditionally as a necessary concomitant of his

plea-based conviction. It has no independent basis; no vitality apart from the guilty plea conviction. It is not forfeited as the price of appeal; a successful appeal is rather the agency of its destruction because the vacated guilty plea was the cornerstone of its existence.

Practical considerations abound. It is everywhere acknowledged that the disposition of criminal charges upon pleas of guilty is essential to the orderly administration of justice. It is also acknowledged in most places that appellate challenges to guilty pleas have multiplied intolerably.

The dismissal of higher charges contemporaneously with the entry of pleas to lesser offenses is a daily occurrence. The practice is called plea bargaining. Whatever its shortcomings, plea bargaining is the result of the needs, the desires, and the decisions of practical men on both sides of the adversary criminal process.

The rule of *Mullreed* v *Kropp, supra,* destroys the balance at the plea bargaining table. It holds out to a defendant the opportunity, through appellate review, to obtain the benefit of his bargain while avoiding the natural consequence thereof.

Mullreed was a hard case, to be sure. The Circuit Court of Appeals took care in its recitation of facts to suggest that the prosecuting attorney had overcharged the defendant in the first instance; that the plea was coerced under threat of incarceration without bail and without speedy trial; that a co-defendant received a very minimal sentence. while *Mullreed* was treated sternly:

> "A week later both of the defendants had an 'interview' with the State Prosecutor, at which time the Prosecutor informed them that he had some doubts as to whether a chair would constitute a dangerous weapon for purposes of the armed robbery statute. For that reason he said he was adding a second count to the information, a lesser offense, 'robbery unarmed.' After explaining this charge and the penalties, the Prosecutor told both defendants that there would be no jury in the Jackson County Circuit Court for three months; that unless defendants could fur-

> **nish bail they would have to remain in jail until then and would be prosecuted on the 'robbery armed' count with the second count added.**
>
> **"Both men agreed to plead guilty to 'robbery unarmed.' When taken before the Court Passow renounced his decision. He later obtained counsel, went before a different judge and received a sixty day sentence. Mullreed, however, stuck by his agreement and pleaded guilty. The plea was accepted by the Court, and he was sentenced to serve ten to fifteen years in the state prison." (pp 1096-1097)**

But none of these unhappy considerations bear upon the question of whether a plea of guilty to a lesser included offense operates as an implied acquittal of the higher charge.

To reach that conclusion, it was necessary for the Circuit Court of Appeals on two occasions to refer to the arraignment at which the defendant pleaded guilty as "a trial to the court" and a "non-jury trial."

It was also necessary for the Circuit Court of Appeals to conclude that the requirement in our state judicial investigation into the truth of a guilty plea, MCLA 768.35; MSA 28.1058; GCR 1963, 785.3(2), constituted an affirmative finding upon the elements of the lesser offense, so as to operate as an implied acquittal of the more serious charge.

Both of these conclusions are at variance with Michigan law and practice. Proceedings upon a guilty plea are not trials in any sense of the word. They are, rather, arraignments, as clearly shown by the subtitle of GCR 1963, 785.3, and the language of the rule.

Nor do the aforementioned statutes and court rule vest the court with any jurisdiction to find the defendant guilty upon the higher charge. There is no "refusal to convict on the greater" offense, from which any implication of acquittal can flow. Since the defendant cannot complain of a plea taken to an offense less than actually committed, *People* v *Collins*, 380 Mich 131 (1968), the statutory inquiry need determine only his minimum guilt. The gen-

eral rule is that where a criminal information is dismissed before a jury has been sworn, or evidence taken thereon, the dismissal is not an acquittal. The defendant is not regarded as having been in jeopardy thereon. *People* v *Kuhn,* 67 Mich 463 (1887).

There is no reason to apply a different rule merely because simultaneously with the dismissal a plea of guilty is entered upon a lesser offense.

As long as the defendant's plea-based conviction for manslaughter remained, it was a bar to prosecution for murder.

This is not because the defendant had been impliedly acquitted of murder, but because he stood convicted of manslaughter arising out of the same homicide.

In *Green* v *United States, supra,* the court reasoned that the defendant was entitled to the benefit of the plea of *autrefois acquit* or former acquittal stemming from the jury's implied acquittal of first degree murder.

Were this defendant McMiller to have been charged with murder, while his manslaughter conviction remained, his defense would have been *autrefois convict* or a former conviction resting upon the same identical act or crime. *People* v *Gault,* 104 Mich 575 (1895); *People* v *Beverly,* 247 Mich 353 (1929).

The conviction is affirmed.

(s) Thomas E. Brennan

(s) Mary S. Coleman

APPENDIX B — OPINION OF THE MICHIGAN COURT OF APPEALS AFFIRMING DEFENDANT'S TRIAL CONVICTION

(Filed January 24, 1972)

(No. 9146)

BEFORE: McGregor, P.J.; Fitzgerald, Quinn, JJ.

PER CURIAM

Defendant was charged on an open count of murder. In January, 1969, he pled guilty to manslaughter[1] and was sentenced to 10 to 15 years in prison. Defendant appealed that conviction on the grounds that insufficient facts were ascertained during the plea proceedings to support the acceptance of the plea. On the prosecution's confession of error, this Court vacated the plea and remanded. *People* v *McMiller* (1969), 20 Mich App 309. Defendant was then tried on the open count of murder, was convicted of murder in the second degree[2] and was sentenced to a term of from 15 to 20 years in prison. From this conviction and sentence defendant now appeals, alleging double jeopardy and attacking the harsher sentence on retrial.

The vacation of the guilty plea put defendant in the same position he held prior to the faulty plea. He was, therefore, properly tried on the open count of murder. *People* v *Garcia* (1969), 19 Mich App 465; *Ward* v *Page* (CA 10, 1970), 424 F2d 491. In the majority opinion in *People* v *Harper* (1971), 32 Mich App 73, this Court made an applicable holding:

> "It is simply time for some clear thinking regarding the recently obfuscated nexus between the guilty plea and the jeopardy clause. Those familiar with jeopardy jurisprudence will undoubtedly recognize our reference to the recent opinion of the Sixth Circuit Court of Appeals, *Mullreed* v *Kropp, supra.*

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[1] CL 1948, §750.321 (Stat Ann 1954 Rev §28.553)

[2] CL 1948, §750.317 (Stat Ann 1954 Rev §28.549)

"We hereby express total disagreement with the *Mullreed* opinion. It ignores the importance of the plea mil ieu. Compare *Ward* v *Page, supra.* We agree, rather, with every contention raised on behalf of the State of Michigan in *Mullreed* and think the Sixth Circuit's opinion should not and need not be followed in Michigan. This is especially true with regard to Judge Phillips' characterization of Michigan law appearing at pp 1100, 1102:

"'We think the conviction and sentence necessarily show that the trial court found an evidentiary concurrence of the elements required for the conviction, otherwise the conviction on the guilty plea would not have been lawful.

* * *

"'It is apparent that the conviction on the lesser offense requires an affirmative finding that the actor was not armed with a dangerous weapon. This determination necessarily is inconsistent with a concurrent or subsequent finding that he committed robbery while armed.'

"Such is not the State of Michigan's law. For complete explication, see *People* v *Sylvester Johnson* (1970), 25 Mich App 258.

"Defendant Harper's conviction upon his plea of guilty to the reduced charge of second-degree murder is affirmed."

Again, this Court must reject the rule formulated by the Sixth Circuit in *Mullreed, supra.*

Although the right of appeal is impaired where the record is devoid of any grounds supporting a harsher sentence upon conviction for the same crime after a successful appeal, *People* v *Mulier* (1968), 12 Mich App 28, *North Carolina* v *Pearce* (1969), 395 US 711 (89 S Ct 2072, 23 L ed 2d 656), a harsher sentence is justified where the conviction is for a more serious offense, rather than the same offense. *United States ex rel Williams* v *McMann* (1 CA 2, 1970), 436 F2d 103; *People* v *Garcia, supra.*

Affirmed.

APPENDIX C — OPINION OF THE MICHIGAN COURT OF APPEALS VACATING DEFENDANT'S INITIAL PLEA

(Filed November 26, 1969)

(No. 7621)

BEFORE: Levin, P.J., Burns, T. M. and Danhof, JJ.

PER CURIAM

On November 6, 1968, the defendant was charged with the crime of murder and on January 13, 1969, while represented by counsel, he pleaded guilty to the lesser included offense of manslaughter. CL 1948, §750.321 (Stat Ann 1954 Rev §28.553). Following an examination of the defendant, the trial court accepted the plea of guilty. On January 28, 1969, defendant was sentenced to a term of 10 to 15 years in prison.

On appeal defendant's only question is whether the trial judge sufficiently inquired into the truth of defendant's plea of guilty so as to warrant the acceptance of the plea.

The people have confessed error herein.

The record of the lengthy examination of the defendant relative to his plea shows that his responses do not satisfy legal requirements. GCR 785.3, MCLA §768.35.

The plea of guilty by the defendant to the offense of manslaughter is hereby vacated.

Reversed and remanded.